In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 512

ELLIOTT V. BELL, SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK, AS LIQUIDATOR OF THE BUSINESS AND PROPERTY IN THE STATE OF NEW YORK OF YOKOHAMA SPECIE BANK, LTD., PETITIONER

v.

EUGENE T. SINGER

No. 513

ELLIOTT V. BELL, SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK, AS LIQUIDATOR OF THE BUSINESS AND PROPERTY OF YOKOHAMA SPECIE BANK, LTD., IN THE STATE OF NEW YORK, PETITIONER

v.

BANQUE MELLIE IRAN

ON PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted by the United States as amicus curiae in support of the peti-

tions for writs of certiorari to the Court of Appeals of the State of New York filed in the above-entitled cases by Elliott V. Bell, Superintendent of Banks of the State of New York. The facts and issues are fully stated in those petitions. As is there pointed out, the New York Court of Appeals held (1) that the claim asserted by the plaintiff in each case rests upon a transaction prohibited by Executive Order 8389, as amended, and rules and regulations issued pursuant thereto, (2) that such Order and rules and regulations did not prevent the accrual or creation of a claim on behalf of the plaintiffs in each action, but merely prevented payment of such claim until an appropriate federal license is obtained, and (3) that no such license has been issued. The New York Superintendent seeks review only of the second of these holdings.[1]

[1] The respondent in each case has also filed a petition for writ of certiorari. The petition of Banque Mellie Iran, No. 528, is conditional on the granting of the petition in No. 513. The petition of Eugene T. Singer, No. 527, is unconditional.

In our view the decisions of the New York Court of Appeals were correct on the questions raised by the petitions in Nos. 527 and 528. No conflict is asserted in those petitions with any decision of any court, and we are aware of none. The questions presented are merely whether particular transactions came within the prohibitions of the freezing order and whether certain documents issued by the Treasury Department should be construed as licensing those transactions notwithstanding the fact that they were never regarded as such licenses by either the Treasury Department, the Office of Alien Property Custodian or the Department of Justice. Petitioner Singer seeks to raise a further question as to whether the licensing authority over the bank in liquidation rested with the Treasury Department or the Office of Alien Property Custodian. That question, we believe, is not properly presented since the

In our view the holding of the Court of Appeals that a claim had accrued, notwithstanding the prohibitions of Executive Order 8389 and the absence of a license thereunder, is clearly erroneous and in conflict with the decision of this Court in *Propper* v. *Clark*, 337 U. S. 472, rehearing denied, 338 U. S. 841, as well as with other decisions cited in the petition in No. 512. The United States presented that view to the New York Court of Appeals by briefs amicus curiae and by memoranda in support of the applications for reargument made by the Superintendent. The existence of this conflict is fully shown by the petition in No. 512, and we shall not repeat that showing. In this memorandum we wish to point out certain additional considerations not referred to in that petition, which relate to the public importance of the question presented and to the adverse effect of the decision below on the rights of the United States.

The interest of the United States in the question presented by the Superintendent's petitions is twofold. It has a general interest that the so-called "freezing" regulations be correctly construed as denying effect to rights purportedly created by transactions prohibited by those regulations and

---

Court of Appeals rightly held that neither agency had licensed payment of the claim in suit. Moreover it has no present importance for there can be no possible dispute that since the issuance of Executive Order 9989, August 20, 1948, 13 F.R. 4891, all licensing authority has rested in the Department of Justice. Accordingly, we suggest that the petitions in Nos. 527 and 528 present no questions calling for review by this Court.

not licensed pursuant to them. The importance of such a construction to the entire program of controls over foreign property which has obtained during World War II was fully stated in the brief for the Attorney General in *Propper* v. *Clark, supra.* As this Court declared in that case, 337 U. S. at p. 484:

> The freezing order of June 14, 1941, immobilized the assets covered by its terms so that title to them might not shift from person to person, except by license, until the Government could determine whether those assets were needed for prosecution of the threatened war or to compensate our citizens or ourselves for the damages done by the governments of the nationals affected.

The principle of this holding should not be emasculated by decisions, such as those of the Court of Appeals below, permitting the accrual of rights to blocked property as the result of transactions prohibited by and not licensed pursuant to the freezing regulations.

The United States also has another and more specific interest in these cases. That interest arises because the Alien Property Custodian has vested in himself the excess proceeds of the liquidation of the Yokohama Specie Bank (Vesting Order 915, issued February 15, 1943, 8 F. R. 2457). Under that vesting order the Attorney General, as successor to the Alien Property Custodian, is entitled to receive all funds in the hands of the Superin-

tendent after payment of allowed or established claims of creditors and expenses of liquidation (Record in No. 512, pp. 485-488).

The decisions of the Court of Appeals may impose a number of obstacles to the reduction to possession, administration and disposition by the Attorney General of the funds claimed by these plaintiffs. Under those decisions the plaintiff in each case, notwithstanding the absence of a license, has been held to possess an accrued claim. The New York cases appear to indicate that such an accrued claim may give him a right *in rem* against the assets in the hands of the Superintendent. *People* v. *American Loan & Trust Co.*, 172 N. Y. 371, 377, 378; *Lafayette Trust Co.* v. *Beggs*, 213 N. Y. 280, 290 (concurring opinion). Cf. *Ticonic National Bank* v. *Sprague*, 303 U. S. 406, 412. Thus, although the plaintiff could never be paid without a license, it might assert the existence of a right *in rem* to the assets presently held by the Superintendent.[2] That assertion might impede or delay the Attorney General in his efforts to secure possession of those assets. Moreover, even after the Attorney General has reduced those assets to possession, his administration and disposition of the

---

[2] The Superintendent has already turned over to the Custodian approximately $5,000,000 in cash and $25,000,000 face amount of assets in kind. He retains reserves for certain claims, including those of Singer and the Banque Mellie Iran, and for liquidation expenses. Additional turnovers to the Attorney General will be called for as additional funds become free of claim.

funds might be hampered. The plaintiff would be in a position to assert that the decision of the New York Court of Appeals confirmed in him a right *in rem* to the vested assets of a sort which could be asserted against the Attorney General under the Trading With the Enemy Act, as amended (Trading With the Enemy Act, §§ 9, 32, 50 U. S. C. App. §§ 9, 32). On the other hand, if the decisions of the Court of Appeals are reversed and this Court holds that in the absence of a license no rights of any kind accrued in favor of the plaintiff, there will be no doubt that the Attorney General is entitled to the funds free and clear of any claim of the plaintiff to an interest in them.[3]

The difficulties created by the decision of the Court of Appeals extend farther than this, however. There are eight other cases presently pending in the courts of New York against the Superin-

[3] As the record now stands, neither Singer nor Banque Mellie Iran has been licensed. Numerous applications filed by or on behalf of Singer's assignor and Banque Mellie Iran were denied in 1941-42. Nevertheless, there is a possibility that a license might ultimately issue in either or both of these cases authorizing the transactions on which the plaintiff's claim is based. The Department of Justice (which has sole jurisdiction to determine the licensing questions, Executive Order 9193, §§ 2, 6, 7 F.R. 5205; Executive Order 9989, 13 F.R. 4891) has felt that after all questions of fact and state law had been definitively settled by the State court adjudications, it would be appropriate to reconsider the licensing questions involved. Accordingly, the Department is now actively considering those questions. Singer, or his assignor, has been invited to file a new application and consideration is being given to an application filed by Banque Mellie Iran shortly after the decision of the Court of Appeals. It is hoped that final decisions granting or denying licenses in each of these cases may be made in the fairly near future.

tendent which are similarly based on unlicensed transactions.[4] If the decisions of the Court of Appeals stand, it may appear worthwhile to the plaintiffs in these cases, notwithstanding denial of a license, to seek an adjudication in the New York courts that their claims have accrued.[5] While such an adjudication would not confer a right to payment, it might be held to give the party procuring it some interest in the funds, which, for reasons already indicated, might be deemed of value. If the decisions of the Court of Appeals are reversed, however, it will be made unmistakably plain that the denial of a license constitutes a complete bar to the acquisition of any rights. A reversal of the decisions of the Court of Appeals may thus obviate a substantial amount of litigation.[6]

---

[4] There is also at least one such case pending in the California courts in connection with the liquidation of the San Francisco Agency of the Yokohama Specie Bank.

[5] The expenses of such litigation will be borne ultimately by the United States, since they will be deducted from the excess proceeds payable to the Attorney General under his Vesting Order.

[6] In these cases also it is planned to give renewed consideration to the licensing question. Although it had been the policy of the Department of Justice to defer consideration of that question until issues of fact and state law had been adjudicated in the state courts, it is believed that it will now be possible in the light of the clarifications obtained in the *Singer* and *Banque Melhe Iran* cases finally to resolve the licensing issues in many, if not all, of these cases in advance of such litigation. In those cases in which it is decided to grant licenses or to postpone licensing action until after state court adjudication, the necessity of litigation may be present regardless of what action this Court takes. In those cases, however, in which licenses can be finally denied at this time a

The Court of Appeals' holdings create an anomalous situation. Under them, notwithstanding the absence of a license, a party is regarded as having an established claim although he can never come into the enjoyment of the claimed funds because payment will be indefinitely withheld; the United States will be able to get possession, but its enjoyment and use of the funds may be interfered with by reason of the party's claim of an *in rem* interest in the funds. Such an anomaly cannot fail to lead to complications and interminable litigation. All of these difficulties will be removed, however, if this Court, applying the principles clearly laid down in *Propper* v. *Clark, supra,* holds that no title or interest in property of any kind whatsoever is acquired by an unlicensed transaction.

Accordingly, we believe that the petitions in Nos. 512 and 513 should be granted.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

FEBRUARY, 1950.

---

reversal by this Court of the decision of the Court of Appeals will, as indicated in the text, eliminate the possibility of further litigation.

U. S. GOVERNMENT PRINTING OFFICE 1950 872988 482